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No. 87-2048

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TEXACO INC.,

Appellant,

v.

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,
Appellees.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE OF THE NATIONAL
ASSOCIATION OF TEXACO WHOLESALERS**

Of Counsel:

WILLIAM L. TAYLOR
TAYLOR, THIEMANN &AITKEN
Suite 300
908 King Street
Alexandria, Va 22314

GREGG R. POTVIN
915 Constitution Avenue, N.E.
Washington, D.C. 20002
(202) 547-1039
*Counsel for National Association
of Texaco Wholesalers*

PAUL B. JACOBY
PROVORNY, JACOBY & ROBINSON
Suite 502
1350 Connecticut Avenue, N.W.
Washington, D.C. 20036

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Association of Texaco Wholesalers hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the National Association of Texaco Wholesalers arises because its members will be directly and negatively affected should the ruling of the Court of Appeals for the Ninth Circuit stand. The Association is better able to argue the effect of this case on its members and the central importance of

functional discounts to wholesalers of refined petroleum products, particularly motor fuel, than either of the parties would be.

Respectfully submitted,

Counsel for the National
Associaton of Texaco
Wholesalers

GREGG R. POTVIN
TAYLOR, THIEMANN & AITKEN
915 Constitution Avenue, N.E.
Washington, D.C. 20002
(202) 547-1039
*Counsel for National Association
Texaco Wholesalers*

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF TEXACO WHOLESALERS

INTEREST OF THE NATIONAL ASSOCIATION OF TEXACO WHOLESALERS

The National Association of Texaco Wholesalers is an independent trade association composed of 1,300 wholesalers of "TEXACO" petroleum products. These wholesalers supply approximately 15,000 retail outlets, and collectively sell over half the gasoline and over 70 percent of the "middle distillates" refined by Texaco and sold in the United States.

This brief is submitted in support of the appellant. The text of the brief *Amicus Curiae* hitherto submitted with respect to the Petition for a Writ of Certiorari is incorporated by reference herein.

As detailed below, the Ninth Circuit's decision in this case threatens to destroy the entire wholesale sector of petroleum marketing, including the businesses of every member of the Association. Accordingly, the members have a vital interest in the outcome of the action.

ARGUMENT

Wholesalers exit- and justify that existence in economic terms- only by the services or functions they provide.

If independent wholesalers of refined petroleum products- particularly motor fuel marketed under the brand name of a major refiner, and the retailers they serve, are to continue as a viable sector of the economy; it is essential that the granting of functional discounts be continued. Only if wholesalers are compensated for the cost saved their suppliers by the wholesaler performed functions, can the wholesalers continue to supply these services.

These functional discounts permit the more efficient serving of the consumer by small businesses, as compared to direct distribution by the refiners themselves. Local needs are met more promptly and economically by local wholesalers than by centralized refiner delivery. This is particularly true in the case of motor fuel. Retail outlets can, and do, exhaust their supplies contained in the underground tanks in a very brief, and unpredictable, time span. Thus, motorists' needs- as well- are more efficiently served by prompter localized supply. During periods of supply disruption, local supply has proven it can best cope with the myriad needs of the local market. The secondary

storage provided by wholesalers is a vital link in the supply chain, even in the context of national defense.

To be valid, functional discounts must reflect real functional differences. See: *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952). Further, for such discounts to be administratively practicable, they must be based on the factor common to all recipients of the discount: the savings to the grantor of the discount, arising from the fact that it is relieved from the burdens of those functions which it would necessarily have performed, had the wholesaler not performed them instead.

To the extent that a cost justification rationale is the underlayment of functional discounts, it is submitted that *only* discounts based on the savings to the supplier-grantor could validly fill this role. The cost to the recipient (of the functional discount) of performing the requisite functions is irrelevant. The incalculable burden of computing and administering a "buyer's cost" discount would dictate prompt adoption of a one price system, a death knell for wholesalers. The potential for anticompetitive effects from an overly rigid application of the Robinson-Patman Act foreseen by *Great Atlantic & Pacific Tea Co. v. F.T.C.*, 440 U.S. 69,80 (1979) would proliferate.

Nor could there be any adverse effect upon competition if the discount granted is equal to the cost from which the grantor is relieved. This is so, because the refiner would be subject to the same costs whether supplying retailers, not performing the wholesale functions and not receiving the discount, or wholesalers who both performed the function and received the discount. See: *Doubleday & Co.*, 52 F.T.C. 169, 207-208 (1955).

In light of the fact that plaintiffs, themselves, advised the jury that no wholesaler operated stations were owned by Dompier until 30 months of the damage period had elapsed (Tr.3183); dual distribution by the recipient of functional discounts is not an issue presented by this case.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed and remanded. This Court should enunciate with final clarity the rule that functional discounts to wholesalers can not result in price discriminations, if the discount is based upon and equal to the cost from which the grantor is relieved by the performance of valid functions by the wholesaler receiving the functional discount.

Dated: August 3, 1989

Respectfully submitted,

GREGG R. POTVIN
TAYLOR, THIEMANN & AITKEN
915 Constitution Avenue, N.E.
Washington, D.C. 20002
*Counsel for National Association
of Texaco Wholesalers*

CERTIFICATE OF SERVICE

I, Gregg R. Potvin, a member of the Bar of this Court, hereby certify that on this 3rd day of August, 1989, three copies of the Motion for Leave to File a Brief Amicus Curiae in the above titled case were mailed, first class postage prepaid, to counsel for petitioners, and to counsel for respondents, as listed below. I further certify that all parties required to be served have been served.

Counsel for Petitioners:

MILTON J. SCHUBIN
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

Counsel for Respondents:

ROBERT H. WHALEY
LUCINDA H. WHALEY
WINSTON & CASHATT
19th Floor
Seafirst Financial Center
Spokane, Washington 99201

JOHN S. EBEL
CULP, DWYER, GUTTERSON & GRADER
One Union Square
Seattle, Washington 98101

GREGG R. POTVIN